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FILED
NOV 17 2005

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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17 Attorneys for Defendants EVERGREEN DATA SYSTEMS, INC.,
18 BRUCE R. MCALLISTER and STEVEN J. DEMARTINI

19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**
21 SYNAPSIS, LLC, a Nevada Limited } CASE NO. CV05-01524 JF
22 Liability Company, }
23 Plaintiff, } Action filed: January 10, 2005
24 v. } STIPULATED PROTECTIVE ORDER
25 EVERGREEN DATA SYSTEMS, INC., }
26 a California Corporation, BRUCE R. }
27 MCALLISTER, an individual, STEVEN }
28 J. DEMARTINI, an individual, }
 IRELAND SAN FILIPPO, LLP, a }
 California limited liability partnership, }
 and DOES 1 through 10, inclusive, }
 Defendants. }

29 **1. PURPOSES AND LIMITATIONS**

30 Disclosure and discovery activity in this action are likely to involve production

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1 of confidential, proprietary, or private information for which special protection from
 2 public disclosure and from use for any purpose other than prosecuting this litigation
 3 would be warranted. Accordingly, the parties hereby stipulate to and petition the
 4 court to enter the following Stipulated Protective Order. The parties acknowledge
 5 that this Order does not confer blanket protections on all disclosures or responses to
 6 discovery and that the protection it affords extends only to the limited information or
 7 items that are entitled under the applicable legal principles to treatment as
 8 confidential. The parties further acknowledge, as set forth in Section 10, below, that
 9 this Stipulated Protective Order creates no entitlement to file confidential
 10 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be
 11 followed and reflects the standards that will be applied when a party seeks
 12 permission from the court to file material under seal.

13 2. DEFINITIONS

14 2.1 Party: any party to this action, including all of its officers,
 15 directors, employees, consultants, retained experts, and outside counsel (and their
 16 support staff).

17 2.2 Disclosure or Discovery Material: all items or information,
 18 regardless of the medium or manner generated, stored, or maintained (including,
 19 among other things, testimony, transcripts, or tangible things) that are produced or
 20 generated in disclosures or responses to discovery in this matter.

21 2.3 “Confidential” Information or Items: information (regardless of
 22 how generated, stored or maintained) or tangible things that qualify for protection
 23 under standards developed under F.R.Civ.P. 26(c).

24 2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or
 25 Items: extremely sensitive “Confidential Information or Items” whose disclosure to
 26 another Party or nonparty would create a substantial risk of serious injury that could
 27 not be avoided by less restrictive means.

28 2.5 Receiving Party: a Party that receives Disclosure or Discovery

1 Material from a Producing Party.

2 2.6 Producing Party: a Party or non-party that produces Disclosure or
3 Discovery Material in this action.

4 2.7. Designating Party: a Party or non-party that designates
5 information or items that it produces in disclosures or in responses to discovery as
6 "Confidential" or "Highly Confidential— Attorneys' Eyes Only."

7 2.8 Protected Material: any Disclosure or Discovery Material that is
8 designated as "Confidential" or as "Highly Confidential – Attorneys' Eyes Only."

9 2.9. Outside Counsel: attorneys who are not employees of a Party but
10 who are retained to represent or advise a Party in this action.

11 2.10 House Counsel: attorneys who are employees of a Party.

12 2.11 Counsel (without qualifier): Outside Counsel and House Counsel
13 (as well as their support staffs).

14 2.12 Expert: a person with specialized knowledge or experience in a
15 matter pertinent to the litigation who has been retained by a Party or its counsel to
16 serve as an expert witness or as a consultant in this action and who is not a past or a
17 current employee of a Party or of a competitor of a Party's and who, at the time of
18 retention, is not anticipated to become an employee of a Party or a competitor of a
19 Party's. This definition includes a professional jury or trial consultant retained in
20 connection with this litigation.

21 2.13 Professional Vendors: persons or entities that provide litigation
22 support services (e.g., photocopying; videotaping; translating; preparing exhibits or
23 demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and
24 their employees and subcontractors.

25 3. SCOPE

26 The protections conferred by this Stipulation and Order cover not only
27 Protected Material (as defined above), but also any information copied or extracted
28 therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus

1 testimony, conversations, or presentations by parties or counsel to or in court or in
 2 other settings that might reveal Protected Material.

3 4. DURATION

4 Even after the termination of this litigation, the confidentiality obligations
 5 imposed by this Order shall remain in effect until a Designating Party agrees
 6 otherwise in writing or a court order otherwise directs.

7 5. DESIGNATING PROTECTED MATERIAL

8 5.1 Exercise of Restraint and Care in Designating Material for
 9 Protection. Each Party or non-party that designates information or items for
 10 protection under this Order must take care to limit any such designation to specific
 11 material that qualifies under the appropriate standards. A Designating Party must
 12 take care to designate for protection only those parts of material, documents, items,
 13 or oral or written communications that qualify – so that other portions of the
 14 material, documents, items, or communications for which protection is not warranted
 15 are not swept unjustifiably within the ambit of this Order.

16 Mass, indiscriminate, or routinized designations are prohibited.
 17 Designations that are shown to be clearly unjustified, or that have been made for an
 18 improper purpose (e.g., to unnecessarily encumber or retard the case development
 19 process, or to impose unnecessary expenses and burdens on other parties), expose the
 20 Designating Party to sanctions.

21 If it comes to a Party's or a non-party's attention that information or
 22 items that it designated for protection do not qualify for protection at all, or do not
 23 qualify for the level of protection initially asserted, that Party or non-party must
 24 promptly notify all other parties that it is withdrawing the mistaken designation.

25 5.2 Manner and Timing of Designations. Except as otherwise
 26 provided in this Order (see, e.g., second paragraph of section 5.2(a), below), or as
 27 otherwise stipulated or ordered, material that qualifies for protection under this Order
 28 must be clearly so designated before the material is disclosed or produced.

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Designation in conformity with this Order requires:

11 A Party or non-party that makes original documents or materials
12 available for inspection need not designate them for protection until after the
13 inspecting Party has indicated which material it would like copied and produced.
14 During the inspection and before the designation, all of the material made available
15 for inspection shall be deemed "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES
16 ONLY." After the inspecting Party has identified the documents it wants copied and
17 produced, the Producing Party must determine which documents, or portions thereof,
18 qualify for protection under this Order, then, before producing the specified
19 documents, the Producing Party must affix the appropriate legend
20 ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES
21 ONLY") at the top of each page that contains Protected Material. If only a portion or
22 portions of the material on a page qualifies for protection, the Producing Party also
23 must clearly identify the protected portion(s) (e.g., by making appropriate markings
24 in the margins) and must specify, for each portion, the level of protection being
25 asserted (either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL -
26 ATTORNEYS' EYES ONLY").

27 (b) for testimony given in deposition or in other pretrial or trial
28 proceedings, that the Party or non-party offering or sponsoring the testimony identify

1 on the record, before the close of the deposition, hearing, or other proceeding, all
 2 protected testimony, and further specify any portions of the testimony that qualify as
 3 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." When it is
 4 impractical to identify separately each portion of testimony that is entitled to
 5 protection, and when it appears that substantial portions of the testimony may qualify
 6 for protection, the Party or non-party that sponsors, offers, or gives the testimony
 7 may invoke on the record (before the deposition or proceeding is concluded) a right
 8 to have up to 20 days to identify the specific portions of the testimony as to which
 9 protection is sought and to specify the level of protection being asserted
 10 ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
 11 ONLY"). Only those portions of the testimony that are appropriately designated for
 12 protection within the 20 days shall be covered by the provisions of this Stipulated
 13 Protective Order.

14 Transcript pages containing Protected Material must be separately
 15 bound by the court reporter, who must affix to the top of each such page the legend
 16 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
 17 ONLY," as instructed by the Party or nonparty offering or sponsoring the witness or
 18 presenting the testimony.

19 (c) for information produced in some form other than
 20 documentary, and for any other tangible items, that the Producing Party affix in a
 21 prominent place on the exterior of the container or containers in which the
 22 information or item is stored the legend "CONFIDENTIAL" or "HIGHLY
 23 CONFIDENTIAL – ATTORNEYS' EYES ONLY." If only portions of the
 24 information or item warrant protection, the Producing Party, to the extent practicable,
 25 shall identify the protected portions, specifying whether they qualify as
 26 "Confidential" or as "Highly Confidential – Attorneys' Eyes Only."

27 5.3 Inadvertent Failures to Designate. If timely corrected, an
 28 inadvertent failure to designate qualified information or items as "Confidential" or

1 "Highly Confidential – Attorneys' Eyes Only" does not, standing alone, waive the
 2 Designating Party's right to secure protection under this Order for such material. If
 3 material is appropriately designated as "Confidential" or "Highly Confidential –
 4 Attorneys' Eyes Only" after the material was initially produced, the Receiving Party,
 5 on timely notification of the designation, must make reasonable efforts to assure that
 6 the material is treated in accordance with the provisions of this Order.

7 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

8 6.1 Timing of Challenges. Unless a prompt challenge to a
 9 Designating Party's confidentiality designation is necessary to avoid foreseeable
 10 substantial unfairness, unnecessary economic burdens, or a later significant
 11 disruption or delay of the litigation, a Party does not waive its right to challenge a
 12 confidentiality designation by electing not to mount a challenge promptly after the
 13 original designation is disclosed.

14 6.2 Meet and Confer. A Party that elects to initiate a challenge to a
 15 Designating Party's confidentiality designation must do so in good faith and must
 16 begin the process by conferring directly (in voice to voice dialogue; other forms of
 17 communication are not sufficient) with counsel for the Designating Party. In
 18 conferring, the challenging Party must explain the basis for its belief that the
 19 confidentiality designation was not proper and must give the Designating Party an
 20 opportunity to review the designated material, to reconsider the circumstances, and,
 21 if no change in designation is offered, to explain the basis for the chosen designation.
 22 A challenging Party may proceed to the next stage of the challenge process only if it
 23 has engaged in this meet and confer process first.

24 6.3 Judicial Intervention. A Party that elects to press a challenge to a
 25 confidentiality designation after considering the justification offered by the
 26 Designating Party may file and serve a motion under Civil Local Rule 7 (and in
 27 compliance with Civil Local Rule 79-5, if applicable) that identifies the challenged
 28 material and sets forth in detail the basis for the challenge. Each such motion must be

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1 accompanied by a competent declaration that affirms that the movant has complied
 2 with the meet and confer requirements imposed in the preceding paragraph and that
 3 sets forth with specificity the justification for the confidentiality designation that was
 4 given by the Designating Party in the meet and confer dialogue. The burden of
 5 persuasion in any such challenge proceeding shall be on the Designating Party. Until
 6 the court rules on the challenge, all parties shall continue to afford the material in
 7 question the level of protection to which it is entitled under the Producing Party's
 8 designation.

9 7. ACCESS TO AND USE OF PROTECTED MATERIAL

10 7.1 Basic Principles. A Receiving Party may use Protected Material
 11 that is disclosed or produced by another Party or by a non-party in connection with
 12 this case only for prosecuting, defending, or attempting to settle this litigation. Such
 13 Protected Material may be disclosed only to the categories of persons and under the
 14 conditions described in this Order. When the litigation has been terminated, a
 15 Receiving Party must comply with the provisions of section 11, below (FINAL
 16 DISPOSITION).

17 Protected Material must be stored and maintained by a Receiving
 18 Party at a location and in a secure manner that ensures that access is limited to the
 19 persons authorized under this Order.

20 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless
 21 otherwise ordered by the court or permitted in writing by the Designating Party, a
 22 Receiving Party may disclose any information or item designated CONFIDENTIAL
 23 only to:

24 (a) the Receiving Party's Outside Counsel of record in this action,
 25 as well as employees of said Counsel to whom it is reasonably necessary to disclose
 26 the information for this litigation and who have signed the "Agreement to Be Bound
 27 by Protective Order" that is attached hereto as Exhibit A;

28 (b) the officers, directors, and employees (including House

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1 Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this
 2 litigation and who have signed the "Agreement to Be Bound by Protective Order"
 3 (Exhibit A);

4 (c) experts (as defined in this Order) of the Receiving Party to
 5 whom disclosure is reasonably necessary for this litigation and who have signed the
 6 "Agreement to Be Bound by Protective Order" (Exhibit A);

7 (d) the Court and its personnel;

8 (e) court reporters, their staffs, and professional vendors to whom
 9 disclosure is reasonably necessary for this litigation and who have signed the
 10 "Agreement to Be Bound by Protective Order" (Exhibit A);

11 (f) during their depositions, witnesses in the action to whom
 12 disclosure is reasonably necessary and who have signed the "Agreement to Be Bound
 13 by Protective Order" (Exhibit A). Pages of transcribed deposition testimony or
 14 exhibits to depositions that reveal Protected Material must be separately bound by
 15 the court reporter and may not be disclosed to anyone except as permitted under this
 16 Stipulated Protective Order.

17 (g) the author of the document or the original source of the
 18 information.

19 7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS'
 20 EYES ONLY" Information or Items. Unless otherwise ordered by the court or
 21 permitted in writing by the Designating Party, a Receiving Party may disclose any
 22 information or item designated "HIGHLY CONFIDENTIAL – ATTORNEYS'
 23 EYES ONLY" only to:

24 (a) the Receiving Party's Outside Counsel of record in this action,
 25 as well as employees of said Counsel to whom it is reasonably necessary to disclose
 26 the information for this litigation and who have signed the "Agreement to Be Bound
 27 by Protective Order" that is attached hereto as Exhibit A;

28 (b) Experts (as defined in this Order) (1) to whom disclosure is

1 reasonably necessary for this litigation, and (2) who have signed the "Agreement to
2 Be Bound by Protective Order" (Exhibit A);
3 (c) the Court and its personnel;
4 (d) court reporters, their staffs, and professional vendors to whom
5 disclosure is reasonably necessary for this litigation and who have signed the
6 "Agreement to Be Bound by Protective Order" (Exhibit A); and
7 (e) the author of the document or the original source of the
8 information.

9 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED
10 PRODUCED IN OTHER LITIGATION.

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," the Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

18 The Receiving Party also must immediately inform in writing the Party who
19 caused the subpoena or order to issue in the other litigation that some or all the
20 material covered by the subpoena or order is the subject of this Protective Order. In
21 addition, the Receiving Party must deliver a copy of this Stipulated Protective Order
22 promptly to the Party in the other action that caused the subpoena or order to issue.

23 The purpose of imposing these duties is to alert the interested parties to the
24 existence of this Protective Order and to afford the Designating Party in this case an
25 opportunity to try to protect its confidentiality interests in the court from which the
26 subpoena or order issued. The Designating Party shall bear the burdens and the
27 expenses of seeking protection in that court of its confidential material – and nothing
28 in these provisions should be construed as authorizing or encouraging a Receiving

1 Party in this action to disobey a lawful directive from another court.

2 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

3 If a Receiving Party learns that, by inadvertence or otherwise, it has
4 disclosed Protected Material to any person or in any circumstance not authorized
5 under this Stipulated Protective Order, the Receiving Party must immediately (a)
6 notify in writing the Designating Party of the unauthorized disclosures, (b) use its
7 best efforts to retrieve all copies of the Protected Material, (c) inform the person or
8 persons to whom unauthorized disclosures were made of all the terms of this Order,
9 and (d) request such person or persons to execute the "Acknowledgment and
10 Agreement to Be Bound" that is attached hereto as Exhibit A.

11 10. FILING PROTECTED MATERIAL. Without written permission from
12 the Designating Party or a court order secured after appropriate notice to all
13 interested persons, a Party may not file in the public record in this action any
14 Protected Material. A Party that seeks to file under seal any Protected Material must
15 comply with Civil Local Rule 79-5.

16 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing
17 by the Producing Party, within sixty days after the final termination of this action,
18 each Receiving Party must return all Protected Material to the Producing Party. As
19 used in this subdivision, "all Protected Material" includes all copies, abstracts,
20 compilations, summaries or any other form of reproducing or capturing any of the
21 Protected Material. With permission in writing from the Designating Party, the
22 Receiving Party may destroy some or all of the Protected Material instead of
23 returning it. Whether the Protected Material is returned or destroyed, the Receiving
24 Party must submit a written certification to the Producing Party (and, if not the same
25 person or entity, to the Designating Party) by the sixty day deadline that identifies
26 (by category, where appropriate) all the Protected Material that was returned or
27 destroyed and that affirms that the Receiving Party has not retained any copies,
28 abstracts, compilations, summaries or other forms of reproducing or capturing any of

1 the Protected Material. Notwithstanding this provision, Counsel are entitled to retain
2 an archival copy of all pleadings, motion papers, transcripts, legal memoranda,
3 correspondence, and all material protected by the attorney-client privilege and
4 attorney work product doctrine, even if such materials contain Protected Material.
5 Any such archival copies that contain or constitute Protected Material remain subject
6 to this Protective Order as set forth in Section 4 (DURATION), above.

7 **12. MISCELLANEOUS**

8 **12.1 Right to Further Relief.** Nothing in this Order abridges the right
9 of any person to seek its modification by the Court in the future.

10 **12.2 Right to Assert Other Objections.** By stipulating to the entry of
11 this Protective Order no Party waives any right it otherwise would have to object to
12 disclosing or producing any information or item on any ground not addressed in this
13 Stipulated Protective Order. Similarly, no Party waives any right to object on any
14 ground to use in evidence of any of the material covered by this Protective Order.

15 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

16 *NOVEMBER 10*

17 DATED: October , 2005 LEWIS BRISBOIS BISGAARD & SMITH LLP

19 By *(S)*

20 Daniel C. DeCarlo
21 Jonathan S. Pink
22 Members of Lewis Brisbois Bisgaard & Smith LLP
23 Attorneys for Defendants EVERGREEN DATA
24 SYSTEMS, INC., BRUCE R. MCALLISTER and
25 STEVEN J. DEMARTINI

26 *NOVEMBER 8*

27 DATED: October , 2005 LAW OFFICES OF JEFFREY F. SAX

28 By *(S)*

29 Jeffrey F. Sax
30 Member of Law Office of Jeffrey F. Sax,
31 Attorneys for Plaintiff Synapsis, LLC

NOVEMBER 14

1 DATED: October , 2005 STEIN & LUBIN

2

3 By (S)

4 Manuel A. Martinez
5 Patricia L. Boneheyo
6 Members of Stein & Lubin
7 Attorneys for Co-Defendant Ireland San Filippo

8 DATED: October , 2005 LAW OFFICES OF H. JOSEPH NOURMAND

9

10 By (S)

11 H. Joseph Nourmand
12 Member of Law Offices of H. Joseph Nourmand
13 Attorneys for Plaintiff Synapsis, LLC

14 PURSUANT TO STIPULATION, IT IS SO ORDERED.

15 Dated: 11/17/, 2005 

16 United States District/Magistrate Judge

17 LEWIS BISHOP BISGAARD & SMITH LLP
18 221 NORTH FIGUEROA STREET, SUITE 1200
19 LOS ANGELES, CALIFORNIA 90012-2601
20 TELEPHONE (213) 260-1400

1 EXHIBIT A
2

3 **ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

4 I, _____ [print or type full name], of
5 _____ [print or type full address], declare under penalty of perjury
6 that I have read in its entirety and understand the Stipulated Protective Order that
7 was issued by the United States District Court for the Northern District of California
8 on [date] in the case of _____ [insert formal name of the case and the number
9 and initials assigned to it by the court]. I agree to comply with and to be bound by all
10 the terms of this Stipulated Protective Order and I understand and acknowledge that
11 failure to so comply could expose me to sanctions and punishment in the nature of
12 contempt. I solemnly promise that I will not disclose in any manner any information
13 or item that is subject to this Stipulated Protective Order to any person or entity
except in strict compliance with the provisions of this Order.

14 I further agree to submit to the jurisdiction of the United States District Court
15 for the Northern District of California for the purpose of enforcing the terms of this
16 Stipulated Protective Order, even if such enforcement proceedings occur after
17 termination of this action.

18 I hereby appoint _____ [print or type full name] of
19 _____ [print or type full address and
20 telephone number] as my California agent for service of process in connection with
21 this action or any proceedings related to enforcement of this Stipulated Protective
22 Order.

23 Date: _____

24 City and State where sworn and signed: _____

25 Printed name: _____

26 [printed name]

27 Signature: _____

28 [signature]

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